U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

File: A41 268 067 - Harlingen

Date: MAR 17 1999

In re: ELIAS ZUNIGA-ESCAMILLA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jodi Goodwin, Esquire

ON BEHALF OF SERVICE: Thomas M. Bernstein
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony

In an oral decision rendered March 11, 1998, the Immigration Judge found the respondent to be removable under sections 237(a)(2)(A)(iii) and (B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i), as having been convicted of an aggravated felony and a controlled substance violation. The Immigration Judge did not consider the lawful permanent resident respondent's application for cancellation of removal under section 240A of the Act, 8 U.S.C. § 1229b. The respondent has appealed. The appeal will be sustained and the record will be remanded to the Immigration Judge for further proceedings. The request for oral argument is denied. 8 C.F.R. § 3.1(e).

I. THE ISSUE ON APPEAL

On September 28, 1995, the respondent was convicted on his plea of guilty in the 195th District Court, Kleberg County, Texas, of possession of marijuana, a second degree felony, and sentenced to 10 years of incarceration, suspended in lieu of 10 years of community supervision (Exh. 2; cf., Tr. at 17-18). The record of conviction does not specify the statute under which

the respondent was convicted.[1] The respondent admitted that he possessed about 132 pounds of marijuana (Tr. at 24). The respondent contends that his conviction is not an aggravated felony.

Substantial argument has been made in this case about the application of, and the Immigration Judge's decision revolves on, United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997). The Immigration Judge found that the United States Court of Appeals for the Fifth Circuit, the circuit in which this case arises, determined in United States v. Hinojosa-Lopez that the crime for which the respondent had been convicted was an aggravated felony. The respondent argues that United States v. Hinojosa-Lopez is not controlling law; the Immigration and Naturalization Service argues that this case is controlled by United States v. Hinojosa-Lopez. We have noted that the Immigration and Nationality Act and the Sentencing Guidelines both utilize the term "aggravated felony" prior to this, but we have not stated unequivocally the terms of that relationship. Matter of Alcantar, 20 I&N Dec. 801, 807-8 (BIA 1994), citing United States v. Frias-Trujillo, 9 F.3d 875 (10th Cir. 1993) (similar 16 level increase under section 2L1.2(b)(2) of the Guidelines); United States v. Rodriguez, 979 F.2d 138 (8th Cir. 1992) (same).

II. AGGRAVATED FELONY AND THE SENTENCING GUIDELINES

United States v. Hinojosa-Lopez, supra, arose from the sentencing of a defendant for violating sections 276(a) and (b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1326(a), (b)(2) (1994), for unlawful presence in the United States after deportation. The Court of Appeals found that a 16-point increase in the defendant's offense level under United States Sentencing Guideline 2L1.2(b)(2) was appropriate, rather than a 4-point increase under U.S.S.G. § 2L1.2(b)(1), because the respondent had previously been convicted of an aggravated felony, i.e. possession of marijuana, a Texas second degree felony. Accordingly, before turning to the

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[1] The only Texas statute applicable to possession of marijuana and the facts of this case is the Texas Health & Safety Code, § 481.121, which provides:

> (a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.
>
> (b) An offense under Subsection (a) is:
>
> (1) a Class B misdemeanor if the amount of marihuana possessed is two ounces or less;
>
> (2) a Class A misdemeanor if the amount of marihuana possessed is four ounces or less but more than two ounces;
>
> (3) a state jail felony if the amount of marihuana possessed is five pounds or less but more than four ounces;
>
> (4) a felony of the third degree if the amount of marihuana possessed is 50 pounds or less but more than 5 pounds;
>
> (5) a felony of the second degree if the amount of marihuana possessed is 2,000 pounds or less but more than 50 pounds; and
>
> (6) punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000, if the amount of marihuana possessed is more than 2,000 pounds.

statute in question, we must look to the issue of whether this case is binding upon the Immigration Judge and this Board.

We must begin with the fundamental proposition that there is only one definition of "aggravated felony" that has been enacted by Congress. Section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Pub. L. 100-690, Title VII, S 7342, 102 Stat. 4469 (Nov. 18, 1988) (adding paragraph (43); Pub. L. 101-649, tit. V, § 501(a), 104 Stat. 4995, 5048 (Nov. 29, 1990) (expanding definition); Pub. L. 102-232, tit. III, § 306(a)(1), 105 Stat. 1737, 1750 (Dec. 12, 1991) (making technical corrections); Pub. L. 103-416, tit. II, § 222(a), 108 Stat. 4310, 4320 (Oct. 25, 1994) (expanding definition); Pub. L. 104-132, tit. IV, § 440(e), 110 Stat. 1277 (Apr. 24, 1996) (expanding definition); Pub. L. 104-208, Div. C, tit. III, §§ 321, 110 Stat. 3009, 3009-546 (Sept. 30, 1996) expanding definition). We have found no other definition of "aggravated felon" in the public laws of the United States. The Attorney General is charged with the administration and enforcement of the Act, and she has delegated to this Board the interpretation of that definition as it arises in proceedings such as this case. Section 1103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1); 8 C.F.R. § 3.1.

However, we are not the sole interpreters of that provision. As noted above, the United States Sentencing Commission has utilized the term in its Sentencing Guidelines. The United States Sentencing Commission is charged with "promulgat[ing] . . . guidelines . . . for the use of a sentencing court." 28 U.S.C. § 994(a). Those Guidelines are presumptively the guidelines within which defendants are to be sentenced. 18 U.S.C. § 3553(a)(4). In addition to the Sentencing Commission's duty to promulgate determinative-sentence guidelines, the Commission is obligated periodically to "review and revise" the Guidelines. 18 U.S.C. § 3553(a)(5); 28 U.S.C. § 994(a)(2), (o). The Commission is also charged with issuing "general policy statements" regarding application of the guidelines. 18 U.S.C. § 994(a)(2). Mistretta v. United States, 488 U.S. 361 (1989). Furthermore, the Supreme Court has held that the interpretative commentary of the Sentencing Guidelines is authoritative unless it violates the Constitution, a federal statute, or is inconsistent with the guideline itself. Stinson v. United States, 508 U.S. 36, 38 (1993). It does not follow that the commentary is binding in all instances. If, for example, the commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline. 18 U.S.C. §§ 3553(a)(4), (b). Stinson v. United States, supra, at 43.

Thus, the guidelines are the equivalent of legislative rules adopted by federal agencies. The functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce. In these respects this type of commentary is akin to an agency's interpretation of its own legislative rules. Provided that an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, that interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." Stinson v. United States, supra, at 45, citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). See, e.g., Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989); Lyng v. Payne, 476

U.S. 926, 939 (1986); United States v. Larionoff, 431 U.S. 864, 872-873 (1977); Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

We agree with the analysis of the Eleventh Circuit in United States v. Lazo-Ortiz, 136 F.3d 1282, 1284-6 (11th Cir. 1998), on the effect of the guidelines and commentary. The pivotal issue is whether the Sentencing Commission intended to incorporate the statutory definition of "aggravated felony" into the guideline's definition by referring to the statutory definition in a citation at the end of U.S.S.G. § 2L1.2, comment. (n.7). The Eleventh Circuit agreed with the position espoused by the United States that § 2L1.2 is not dependent upon section 276 of the Act, 8 U.S.C. § 1326 and that a previous offense may be an "aggravated felony" for the purpose of the 16-level enhancement in the Sentencing Guideline while not qualifying for the statutory enhancement at section 276(b)(2) of the Act, which "aggravated felony" is defined in section 101(a)(43) of the Act. Only the Eighth Circuit has concluded that sections 276 and 101(a)(43) of the Act and U.S.S.G. § 2L1.2 are symmetrical and that the statutory definition applicable of section 101(a)(43) is fully incorporated into the guideline. See United States v. Maul-Valverde, 10 F.3d 544, 545 n. 1 (8th Cir.1993). Every other court of appeals has held that neither the structure of the statute and the guideline, nor the specific reference in the guideline to section 101(a)(43) of the Act, indicate that there was to be any symmetry between the subsections of section 276 of the Act and the U.S.S.G. 2L1.2, or between section 101(a)(43) and the application commentary of the guidelines definitions of "aggravated felony." See United States v. Reyna-Espinosa, 117 F.3d 826, 830 (5th Cir. 1997); United States v. Rios-Favela, 118 F.3d 653, 657 (9th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 730, 139 L.Ed.2d 668 (1998); United States v. Eversley, 55 F.3d 870, 872 (3d Cir. 1995); United States v. Munoz-Cerna, 47 F.3d 207, 211 (7th Cir. 1995); United States v. Frias-Trujillo, 9 F.3d 875, 876-77 (10th Cir. 1993).

For example, the Seventh Circuit considered whether United States v. Munoz-Cerna's pre-November 29, 1990 "crime of violence" could be an "aggravated felony" allowing a 16-level enhancement. Both defendants in United States v. Lazo-Ortiz and United States v. Munoz-Cerna argued that § 1103(a)(43) and its effective date in § 501(b) of the 1990 Immigration Act must be read into the guideline. See United States v. Munoz-Cerna, supra, at 210. The Seventh Circuit found no evidence that the Sentencing Commission intended that the offense characteristics listed in § 2L1.2(b) correlate to the subsections of section 276 of the Act, and found some evidence to the contrary. For example, the Seventh Circuit noted that the effective date of § 2L1.2 was November 1, 1991, almost a full year later than the effective date of the statutory definition. See United States v. Frias-Trujillo, supra, at 211 n. 8.

In United States v. Reyna-Espinosa, the United States argued that the statutory definition was fully incorporated into the guideline because the defendant's conviction for unlawful possession of a firearm was an aggravated felony under the statute but not under the guideline. See United States v. Reyna-Espinosa, supra, at 827-28. The defendant argued that the application note did not incorporate the statutory definition, especially where the language in the commentary was substantially not specific in referring to more than 5 of the 21 subparagraphs in section 101(a)(43) of the Act. United States v. Reyna-Espinosa, supra, at 829. The Fifth Circuit found that the statutory definition was not incorporated and that the defendant's sentence could not be enhanced. United States v. Reyna-Espinosa, supra, at 830. Neither the "See cite" nor the

structure of U.S.S.G. § 2L1.2 indicates an intent to incorporate section 101(a)(43) into the sentencing guideline. Thus, the Fifth and Eleventh Circuits have found that the application notes and guideline, including its definition of "aggravated felony," are independent of the Act and must be applied irrespective of differences between the definitions.

We agree up to that point. However, we might find this somewhat less persuasive in future cases in light of the most recent amendment to the application notes to U.S.S.G. § 2L1.2, which provided effective November 1, 1997 (Amendment 562): "'Aggravated felony' is defined at 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony." Cf., Matter of Lettman, Interim Decision 3370 (BIA 1998). The amendment deleted the previous descriptive language and a "see" cite to section 101(a)(43) of the Act. We should note as well that the difference in language may be no more than the result of inherent delay in amending the Sentencing Guidelines after a change in the Act by the Congress. We note that each amendment to the application notes to the relevant Sentencing Guideline follows a change in the statute be some time. It is not our mission to determine the meaning of the phrase aggravated felony as used in the Sentencing Guidelines, rather we owe deference to the Sentencing Commission on that issue.

Accordingly, we find that the judicial interpretation of the term "aggravated felony" under the Sentencing Guidelines in United States v. Hinojosa-Lopez is not an interpretation of the term "aggravated felony" as defined in the Immigration and Nationality Act and as interpreted by this Board. The United States v. Hinojosa-Lopez interpretation of the sentencing guideline is not binding upon this Board, as it applies a different agency's interpretation in a different decision making process. We defer to the Sentencing Commission for interpretation of that language to the extent that is does not rely upon the Act to determine meaning of words in the interpretation of the Sentencing Guidelines. Finally, we must note that we may feel compelled to follow the determinations of the Courts of Appeals relating to sentences imposed under the interpretations issued November 1, 1997, due to what appears to have been an adoption of the definition in the Act by the Sentencing Commission on that date, but that issue is not before us today.

III. AGGRAVATED FELONY UNDER THE IMMIGRATION AND NATIONALITY ACT

Section 101(a)(43)(B) of the Act defines "aggravated felony" to include "illicit trafficking in a controlled substance (as described in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code." In turn, the latter provision states: "For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)."

In Matter of Barrett, 20 I&N Dec. 171 (BIA 1990), which was clarified by Matter of Davis, 20 I&N Dec. 537 (BIA 1992), we held that a state drug conviction could be considered a conviction for a "drug trafficking crime," and therefore an aggravated felony, if the underlying offense was analogous to a felony under the federal drug laws. The "Barrett/Davis test" for determining whether a state drug offense qualifies as an aggravated felony under section 101(a)(43) of the Act is two-pronged. Under the first prong of that test, a state drug offense is

an aggravated felony if it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered "illicit trafficking" as commonly defined. Matter of Davis, supra. Under the second, alternate prong of the Davis/Barrett test, a state drug offense qualifies as a "drug trafficking crime," and thus as an aggravated felony (regardless of state classification as a felony or misdemeanor) if it is analogous to a felony under the federal statutes enumerated in 18 U.S.C. § 924(c)(2) ("federal drug laws"). In other words, a state drug offense qualifies as a "drug trafficking crime" if it is punishable as a felony under the federal drug laws. It is this second prong that must be applied to this case.

An aggravated felony is defined under section 101(a)(43)(B) to include a drug trafficking crime under 18 U.S.C. § 924(c)(2), which defines a "drug trafficking crime" is defined as "any felony punishable under the Controlled Substances Act . . .." The Controlled Substances Act, 21 U.S.C. § 844(a), criminalizes simple possession of controlled substances. Simple possession of marijuana is, in the first instance, a misdemeanor under federal law, but is classified as a felony upon a second or latter offense. 18 U.S.C. 3559(a). In Matter of L-G-, Interim Decision 3254 (BIA 1995), we reaffirmed the proposition that for immigration purposes, a state drug offense qualifies as a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) if it is analogous to an offense punishable as a felony under the Controlled Substances Act, 21 U.S.C. 801 et seq., and certain other statutes. See Garcia-Olmedo v. U.S., 112 F.3d 399, 400-1 (9th Cir. 1997). We also reaffirmed the Barrett/Davis test.

IV. APPLICATION TO THE INSTANT CASE

In this case, the respondent has been convicted of a State felony drug possession charge. Accordingly, we would apply the first prong of the Barrett/Davis test. The issue is whether the Immigration and Naturalization Service has established that the respondent has been convicted of a State felony that is analogous to a federal drug trafficking crime. We do not find that the evidence in this case establishes such a nexus. Accordingly, the Service has not established that the respondent has been convicted of a drug trafficking offense under section 101(a)(43)(B) of the Act for purposes of removal under section 237(a)(2)(A)(iii) of the Act. Accordingly, insofar as the decision of the Immigration Judge is based upon a finding that the respondent has been convicted of an aggravated felony for purposes of removal, the appeal will be sustained.

The record shows that the respondent has, however, been convicted of an offense involving a controlled substance and is removable under section 237(a)(2)(B) of the Act, as charged. We turn then to the issue of whether the respondent is eligible for any form of relief from removal.

V. CANCELLATION OF REMOVAL

The respondent indicated that he wished to seek cancellation of removal under section 240A of the Act, 8 U.S.C. § 1229b. We do not decide the respondent's eligibility for cancellation of removal because that issue has not been decided by the Immigration Judge. Accordingly, we will remand the record for further proceedings.

ORDER: The appeal is sustained and the record is remanded to the Immigration Court for further proceedings.

FOR THE BOARD